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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 710

AMANA REFRIGERATION, INC.,
Petitioner,

vs.

COLUMBIA BROADCASTING SYSTEM, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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TWENTIETH CENTURY PRESS, INC., CHICAGO 6

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The ground asserted by Amana in its Petition for granting the Writ as to the Rule 54(b) question was the conflict between the decision of the Court below and the decision of this Court in the *Sears, Roebuck* case, 351 U. S. 427 (1956). See Rule 19.1(b) of the Rules of this Court. The ground asserted by Amana for granting the Writ as to the price discrimination question was the importance of this question under the federal anti-trust laws. See same Rule. CBS did not respond to these reasons for granting the Writ but instead discussed matters that are not relevant to this proceeding but nevertheless require an answer. To provide such an answer and to correct the many errors of fact and law contained in the CBS brief, Amana deems it necessary to file this reply brief.

I. The Argument of CBS Regarding the Rule 54(b) Issue.

A. The Question of Abuse of Discretion

CBS completely misstates the position and contentions of Amana on this question.

CBS states (p. 11) that Amana contended "that the Court of Appeals is foreclosed from reviewing the propriety of the grant of the Rule 54(b) certification". Amana obviously made no such contention.

CBS states (p. 8) that Amana "appears to" contend that "the only standard which the Court of Appeals could apply, in determining the propriety of the District Court's action, is whether the order appealed from is 'final'." Amana clearly made no such contention.

Having completely misstated Amana's position, CBS proceeds to answer *that* position by citing the *Sears, Roebuck* case for the obvious proposition that a district court's "certification" order is reviewable by a court of appeals.

The CBS brief thus never reaches the argument asserted by Amana (Pet. pp. 7-10), i.e., that the *standard* applied by the Court below in determining whether the district court abused its discretion conflicts with the standard laid down by this Court in *Sears, Roebuck*. This standard, as well as the three requirements of a proper Rule 54(b) order,[1] was clearly stated by this Court in *Sears, Roebuck* and was repeated verbatim by Amana in its Petition (p. 7). The test applied by the Court below—a test embodying a presumption of invalidity as to all Rule 54(b) appeals—

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1. CBS persists in confusing the interrelationship between Rule 54(b) and §1291 of the Judicial Code. If the three requirements for a valid "certification" order are met (*Sears, Roebuck*, 361 U.S. at 436, quoted on page 7 of Amana's Petition), the order is a "final decision" under Rule 54(b), and, therefore, without any *additional* requirement of finality, is appealable under §1291.

is clearly in conflict with the "inherently separable" standard adopted by this Court. From the fact that CBS chose to ignore this argument in favor of an argument which it attributed to Amana but which Amana never made, one must assume that CBS had no answer to it. The Writ should be granted to correct this conflict between the decision of the Court below and the controlling decision of this Court.

B. The Question of Separate "Claim for Relief"

The argument made by CBS under the misleading caption "The Order Sought to be Appealed is Not 'Final'" (pp. 13-16) is actually an argument on the merits of the "claim for relief" question. This question, although fully argued, was not decided by the Court below, but it was decided by Chief Judge Hastings in his dissent—in favor of Amana. As applied to the case at bar, this question is whether the appealed claim—the Robinson-Patman Act claim—is a "claim for relief" separate from the other claims involved in the case.

By discussing the merits of this issue CBS violates Rule 24.1 of the Rules of this Court which requires briefs in opposition, as well as the petitions themselves, to be limited to the reasons why the Writ should or should not be granted. However, since the issue has been raised, it is incumbent upon Amana to briefly answer the argument of CBS and correct the errors of fact and law contained in its brief.

1. The first error of CBS is its statement that Amana's three claims are based on "one set of facts" (p. 14). This is clearly not the case. The essential allegations which give rise to the price discrimination claim, apart from the injury to Amana, are as follows: (1) Amana's competitors, as well as Amana, purchased network television time from

CBS; (2) the time purchased by Amana, as well as by such competitors, was "prime" or "Class A" time; (3) CBS discriminated between Amana and such competitors with respect to charges made for such network time; and (4) competition *between Amana and its competitors* in the sale of refrigerators, freezers, etc. was thereby injured. *None of such basic factual allegations is material to the claims alleged in either the second or third cause of action.* Conversely, the basic allegations contained in the second and third causes of action—those relating to the "tie-in" practices of CBS resulting in competitive injury *among television station owners* and *television program producers*, respectively—are not remotely material to Amana's First Cause of Action.

2. The second error of CBS is its statement (pp. 14-15) that Amana's three claims represent only a difference in "legal theories". The fact is that, since the essential allegations of the price discrimination claim are entirely different from the essential allegations of the other claims involved in the action, and since the *right* asserted under Amana's first claim (the right not to be discriminated against) is entirely distinct from the rights asserted under its second and third claims (the rights not to be compelled to purchase something unwanted as a condition to purchasing something that is desired), *separate recoveries may be had by Amana under each of its three claims.* Accordingly, much more than differences in legal theory are involved:

> "A single claimant presents multiple claims for relief when his possible recoveries are more than one in number and not mutually exclusive." (Baron and Holtzoff, *Federal Practice and Procedure—Rules Edition*, Section 1193, p. 28.)

3. The third error of CBS is its misreading of the *Sears, Roebuck* case on this point, and its reliance on cases, such as *Reeves* v. *Beardall*, 316 U.S. 283 (1942), that were rendered obsolete by the 1948 amendment to Rule 54(b). The law now is that even a difference in legal theory only (i.e., a difference in the "basis of liability": *Sears, Roebuck*, 76 S. Ct. at 900, footnote 9) is sufficient, for purposes of Rule 54(b), to render a cause of action a separate "claim for relief"[2]:

> "If the District Court certifies a final order on a claim *which arises out of the same transaction and occurrence as pending claims*, and the Court of Appeals is satisfied that there has been no abuse of discretion, the order is appealable." (*Cold Metal Process Co.* v. *United Engineering & Foundry Co.*, 76 S. Ct. 904 at 909; emphasis added.)

The repudiation of the single transaction theory is also pointed up in the Baron and Holtzoff treatise, *Federal Practice and Procedure—Rules Edition*:

> "These decisions (*Sears, Roebuck* and *Cold Metal Process*), read together, certainly repudiate the suggestion that a separate claim, for purposes of Rule 54(b), is that which is 'entirely distinct from all other claims involved in the action and which arises from a different occurrence or transaction'." (Id., Section 1193, p. 28, parenthetical reference added.)

To the same effect, see also "Federal Rule 54(b): The

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2. As pointed out in Amana's Petition (footnote 1), the Second Circuit has apparently declined to follow the *Sears, Roebuck* "basis of liability" test. However, the recent case cited by CBS, *U. S.* v. *New York, New Haven & Hartford R. R. Co.* . . . F. 2d . . ., 28 L. W. 2396 (1960), was concerned with §1292 of the Judicial Code and can not, therefore, be added to the list of Second Circuit cases that are in conflict with the *Sears, Roebuck* and *Cold Metal Process* cases on this point.

Multiple Claims Requirement", 43 *Va. L. Rev.* 229 (1957). Perhaps one of the most compelling arguments for granting the Writ is the fact that CBS, and apparently the Second Circuit as well, has failed to understand the full effect of this Court's interpretation of amended Rule 54(b) in *Sears, Roebuck* and *Cold Metal Process.*

Clearly, even under the old Rule 54(b) and especially under the amended Rule as interpreted by *Sears, Roebuck* and *Cold Metal Process,* Amana's Robinson-Patman Act claim—as stated by Chief Judge Hastings—is a "claim for relief" separate and distinct from the other claims involved in the case.

II. The Argument of CBS Regarding the "Commodity" Issue.

CBS did not and could not refute the ground advanced by Amana for granting the Writ, namely, that this "commodity" issue is one of the most important unanswered questions under the federal anti-trust laws. Instead CBS argues (p. 17) that this Court should not "depart from the customary policy" of refraining from deciding an issue until the court of appeals has done so. However, judging from the certainty expressed by CBS in the last paragraph of its brief as to the correctness of the District Court's decision on the merits[3], one would think CBS would be anxious to have this Court settle that issue with finality at the first available opportunity. Such a decision, far from

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3. In Amana's Petition several recent cases involving this issue were cited, including *Beacon Newspaper Corporation, Inc.* v. *Wichita Eagle Publishing Co., Inc.*, Civil Action No. W-1937 (D. Kansas, pending). Subsequent to the filing of Amana's Petition, the district court denied, without opinion, the defendant's motion to dismiss the complaint. Such denial necessarily implies that the court is of the opinion that advertising space is a "commodity" for purposes of the Clayton Act.

being "advisory" in nature, would constitute an adjudication of a very real controversy between CBS and Amana which must ultimately, if not now, be decided by action of this Court.

CONCLUSION

For the reasons stated in Amana's Petition, and for the additional reasons stated herein, the Writ of Certiorari should be granted.

Respectfully submitted,

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